

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

NO: 5:05-CR-204-D

NO: 5:09-CV-1-D

ZHIVARGO K. JENKINS

)

Petitioner,

)

)

v.

)

MEMORANDUM AND

)

RECOMMENDATION

UNITED STATES OF AMERICA

)

Respondent.

)

This matter was referred to the undersigned to conduct an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel based on the failure to file an appeal. [\[DE-64\]](#). A status conference was held today to prepare for the evidentiary hearing. [\[DE-67\]](#). At the status conference, Petitioner was present with his attorney, Lewis A. Thompson, III. After conferring with his client, Petitioner's counsel informed the Court that Petitioner wanted to withdraw his petition. Whereupon, Petitioner was sworn by the Court and the following colloquy ensued:

THE COURT: This is the docketed status conference in the case of United States, of Zhivargo Jenkins versus the United States.

Mr. Thompson.

MR. THOMPSON: Your Honor, I have met with Mr. Jenkins and conversed with him several times about this pending motion and he advises me this morning that he wish, he desires to withdraw this motion today.

I'd like to go on the record and, and get that --

THE COURT: That'll be fine.

MR. THOMPSON: -- in the record. I have provided Mr. Jenkins with some material that he did not have in his file.

THE COURT: Uh-huh. (Indicating an affirmative response)

MR. THOMPSON: Specifically, an order of Judge Dever denying a motion to suppress and addressing the underlying issue that Mr. Jenkins sought to have reviewed by the Court on appeal and that was the presence or the existence, rather, of a 4 recording of his detention hearing. We've gone over how that was addressed by the trial court and I provided him with a docketing statement, which he also requested in his case, and it's my understanding he now wishes to withdraw his motion.

THE COURT: Mr. Jenkins, would you stand, put your left hand on the Bible -- Mr. Marshal -- and raise your right hand, please?

(Mr. Jenkins is sworn by the Court)

THE COURT: You can put your hand down.

BY THE COURT:

Q Would you state your name, please?

A Zhivargo Kinta Jenkins.

Q And, Mr. Jenkins, you are the petitioner in this case, that is, you asked -- you had filed this motion --

A Yes, sir.

Q -- alleging that your trial counsel, Mr. Welty, was ineffective, is that correct?

A Yes, sir.

Q And that among the reasons you allege was that he failed to file an appeal when you directed him to do so, is that correct?

A Yes sir.

Q An that after speaking to your attorney this morning and going over the materials he's provided you, you heard him say that you wished to withdraw your motion, or your petition, is that correct?

A Yes, sir.

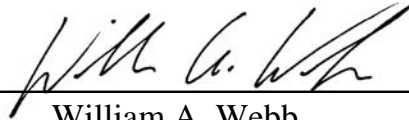
Q Is that what you wish to do?

A Yes, sir.

[Transcript of Status Conference, pgs. 3-5].

Accordingly, it is RECOMMENDED, that Petitioner's motion to withdraw his petition be GRANTED and the petition be dismissed.

SO RECOMMENDED in Chambers at Raleigh, North Carolina this 15th day of July, 2009.

A handwritten signature in black ink, appearing to read "William A. Webb", is written over a horizontal line.

William A. Webb
U.S. Magistrate Judge